IN THE SUPREME COURT

OF THE UNITED STATES

No. 75-577
OCTOBER TERM 1975

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Petitioner,

v.

STATE OF OREGON ex rel State Land Board,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Cases

Texts

INDEX OF AUTHORITIES (Cont.)

IN THE SUPREME COURT

OF THE UNITED STATES

No. _____
OCTOBER TERM 1975

STATE OF OREGON, Acting by and through the State Land Board,

Plaintiff-Appellant,

v.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Defendant-Respondent and Cross-Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

Corvallis Sand and Gravel Company, an Oregon corporation, prays that a writ of certiorari issue out of this Court to review the judgment of the Supreme Court of the State of Oregon entered in the above-entitled case.

OPINION BELOW

The opinion of the Supreme Court of the State of Oregon has not yet been officially reported. It has been unofficially reported 536 P2d 517. The full text of the opinion

appears in the Appendix (A. 69-74). The opinion of the Oregon Court of Appeals has not yet been officially reported. It has been unofficially reported 526 P2d 469. The full text of the opinion appears in the Appendix (A. 23-68). The lower court judgment also appears in the Appendix. (A. 17-22).

JURISDICTION

The judgment of the Supreme Court of the State of Oregon sought to be reviewed is dated and was entered of record on June 12, 1975.

Within the time allowed by law, Corvallis Sand and Gravel Company filed a Petition for Rehearing which raised the questions presented for review herein. The Petition for Rehearing was denied, without opinion, under date of July 17, 1975. (A. 75-76).

QUESTIONS PRESENTED FOR REVIEW

1. Does plaintiff, State of Oregon, have sufficient ownership to maintain statutory ejectment to recover possession of the bed of a navigable fresh water stream where its claim of ownership is based on sovereignty rather than grant and where there is no allegation pleaded and no proof that the public rights of navigation, fishery and related uses are being impaired or interfered with by defendant Corvallis Sand and Gravel Company?

2. Does plaintiff, State of Oregon, have sufficient ownership to maintain statutory ejectment to recover damages for the removal of sand and gravel from the bed of a navigable fresh water stream where its claim of ownership is based on sovereignty rather than grant and where there is no pleaded allegation or proof that the public rights of navigation, fishery and related uses are being impaired or interfered with by the defendant Corvallis Sand and Gravel Company?

STATUTORY PROVISIONS INVOLVED

The following federal and state statutes relevant to this petition are reprinted in the Appendix: 28 U.S.C. 1257(3) (A. 14); 28 U.S.C. 2101(c) (A. 14); [1]ORS 105.005 and ORS 105.010 (A. 14-15).

STATEMENT OF THE CASE

A. Statement of facts.

In June of 1965 the State of Oregon filed a statutory ejectment proceeding against Corvallis Sand and Gravel Company to recover possession of a portion of the bed of the Willamette river. ORS 105.005 and ORS 105.010 (A. 14-15). The Willamette is a fresh water navigable stream above tidewater. The complaint alleged that the State of Oregon was the owner of the river

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[1]ORS refers to Oregon Revised Statutes.

bed by virtue of its sovereignty. There was no allegation that Corvallis Sand and Gravel Company was in any way interfering with the public right of navigation, fishery, or the like. The State of Oregon introduced no evidence to establish any such interference. The only use made of the river by Corvallis Sand and Gravel Company was to remove sand and gravel materials. Corvallis Sand and Gravel Company placed into evidence permits issued by the Corps of Army Engineers (which has jurisdiction over the protection of navigation) authorizing Corvallis Sand and Gravel Company to remove sand and gravel material from the bed of the Willamette river during the time in issue. The State of Oregon also sought damages from Corvallis Sand and Gravel Company on a cubic yard basis for the removal of sand and gravel materials from the river's bed.

Corvallis Sand and Gravel Company demurred to the complaint on the ground the same failed to state facts sufficient to constitute a cause of action. The demurrer was overruled.

The trial court entered a judgment in favor of the State of Oregon against Corvallis Sand and Gravel Company awarding the State of Oregon ownership of portions of the disputed property and also awarding the State of Oregon damages for the removal of sand and gravel materials (A. 17-22).

Both parties appealed the decision to

the Court of Appeals of the State of Oregon. While these appeals were pending, and on December 17, 1973, (after Corvallis Sand and Gravel Company had filed its initial brief on cross-appeal) the United States Supreme Court decided the case of Bonelli Cattle Company et al v. State of Arizona et al, 414 U.S. 313, 38 L.Ed.2d 526, 94 S.Ct. 517 (1973).

The Bonelli decision, supra, was the first to declare that the ownerhip of the beds of navigable fresh water streams is a question of federal law and was also the first to declare that the interest of the state in the riverbed is "as a bed".

In its reply brief in the Court of Appeals of the State of Oregon Corvallis Sand and Gravel Company assigned the following error:

> "The court erred in overruling defendant's demurrer to plaintiff's first amended complaint on the ground the complaint failed to state facts sufficient to constitute a cause of action."

In support of this assignment of error Corvallis Sand and Gravel Company cited Bonelli, supra.

The Court of Appeals of the State of Oregon did not expressly pass upon this assignment of error (A. 23-68) but overruled the assignment by affirming the

judgment of the trial court, with modifications, which had awarded to the plaintiff judgment for possession of substantial portions of the bed of the Willamette river together with damages for the removal of sand and gravel materials therefrom.

Corvallis Sand and Gravel Company filed a Petition for Review of the decision of the Court of Appeals of the State of Oregon in the Supreme Court of the State of Oregon and assigned as error the following:

> "The court erred in ruling that plaintiff had a cause of action despite its failure to plead interference by the defendant with navigation, fishery and related public uses of the disputed property and despite the absence of any evidence to prove such interference."

In support of this assignment of error Corvallis Sand and Gravel Company cited Bonelli, supra, and State v. Gill, 259 Ala 177, 181, 66 S2d 141, 145 (1953) for the proposition the state's title is to the "riverbed as a bed." cited in Bonelli, 38 L.Ed. 526, 536.

The Supreme Court of the State of Oregon affirmed the decision of the Court of Appeals (A. 69-74).

Corvallis Sand and Gravel Company timely filed with the Supreme Court of the State of Oregon a Petition for Rehearing on the two issues herein raised.

The Supreme Court of the State of Oregon denied the petition (A. 75-76).

B. Basis for federal jurisdiction.

Jurisdiction in this court is based upon 28 U.S.C. 1257(3); 28 U.S.C. 2101(c); Rule 19(1)(a) of the Supreme Court of the United States; 32 Am.Jur.2d 722, Federal Practice and Procedure § 253; Williams v. Georgia, 349 U.S. 375, 99 L.Ed. 1161, 75 S.Ct. 814; Missouri Pacific Railroad Company v. Elmore & Stahl, 377 U.S. 134, 12 L.Ed.2d 194, 85 S.Ct. 1142, United States v. Union Central Life Insurance Company, 368 U.S. 291, 7 L. Ed.2d 294, 82 S.Ct. 349; and Bonelli Cattle Company et al v. State of Arizona et al, 414 U.S. 313, 38 L.Ed.2d 526, 94 S.Ct. 517 (1973).

ARGUMENT

Reasons for Allowing the Writ

The opinion of the Supreme Court of the State of Oregon, by ignoring the limitation that the state's interest in the bed of a navigable stream is "as a bed" and not in the individual grains of sand, rocks, or the like, is contrary to the decision of this Court in Bonelli Cattle Company v. Arizona, supra.

The issues here presented, whether or not a state can maintain ejectment (or any similar proceeding such as a suit to quiet title), is of national importance because of the practice of many states to charge

royalties for sand and gravel materials removed from the beds of navigable streams within their respective jurisdictions even though that removal is conducted under permits issued by the Corps of Army Engineers and despite the absence of any allegation or proof that the removal in any way interferes with the public rights of navigation, fishery, recreational use, or like aspects.

The public catches fish in fresh water rivers, removes shell fish from the bed, collects valuable rocks and stones, takes sand, gravel, and the like, all without paying royalty or other charges to the state. However, when parties commercially remove sand and gravel, many states, including Oregon, take the position that they are entitled to maintain ejectment (or a suit to quiet title) and are entitled to damages even though the state's public trust to protect against interference with navigation, fishery, and similar purposes, has in no way been violated.

A decision in this case would decide the extent of the state's interest in the bed of a navigable fresh water stream and its right to maintain an action or suit for recovery of the bed and the right of a state to charge for the removal of sand, gravel, silt, and other materials. The issue involves millions of dollars annually.

In ejectment the plaintiff can recover only on the strength of its own title and not on the weakness of its adversary's.

25 Am.Jur.2d 553, Ejectment, § 19.

The question of the extent of the State of Oregon's interest in the bed of a navigable stream is a federal question to be determined by federal law. Bonelli Cattle Company v. Arizona, 414 U.S. 313, 38 L.Ed.2d 529, 534-36, 94 S.Ct. 517.

The only interest of the State of Oregon in the bed of the Willamette river is in the nature of a navigational servitude for the protection of the public right of navigation, fishery and related uses. Bonelli Cattle Company v. Arizona, 414 U.S. 313, 94 S.Ct. 517, 38 L.Ed.2d 529, 536-37.

The Oregon Court of Appeals recognized the rule in the following language:

> "There are several conclusions to be distilled from Bonelli and other cases dealing with navitable waterways. First and most important is that the state's right in the bed of the river is a limited right and relates to a navigational or related purpose." (A. 39).

The Oregon Court of Appeals also stated:

> "***while the extent of the state's interest should not be narrowly construed because it is denominated a navigational purpose, see Bonelli Cattle Co. v. Arizona, supra, n 15, the implication is clear that the other purposes must somehow be related to the navigational purpose." (A. 39).

Despite the above language the Oregon Court of Appeals declined to declare that the State of Oregon could not maintain the ejectment action or recover damages thereunder. The Supreme Court of the State of Oregon affirmed without comment. (A.

In Bonelli Cattle Company v. Arizona, supra, this Court held that the state's interest in the bed of a navigable stream is in the "riverbed as a bed" citing State v. Gill, 259 Ala 177, 181, 66 So.2d 141, 145 (1953). In Gill, supra, the Alabama court ruled that the state's title:

> "***is a title to the bed as a bed and not the individual grains of sand or lumps of mud that constitute the land making up the bed."

A state, such as Oregon, could properly maintain ejectment and claim damages if someone erected an impediment to navigation, such as a pier, a dam, a floating commercial enterprise or houseboat, or an oil drilling rig. However, when the use is one which does not interfere with the public rights, ejectment does not lie.

The State of Oregon at no time has pleaded, proved or claimed that Corvallis Sand and Gravel Company's removal operations in any way interfere or will interfere with the public interest in the bed of the stream.

Here Corvallis Sand and Gravel Company conducted its sand and gravel removal operations under permits granted by the Corps of Army Engineers. Under these permits it was required not to interfere with any public rights.

The law as to the ownership of the beds of tidal waters is uniform throughout the United States. 78 Am.Jur.2d 817, Waters, § 381. However, there is a great diversity of rulings as to the ownership of the beds of navigable fresh water streams. 78 Am.Jur. 2d 818, Waters, § 381. Some states hold that title is in the state. Some states hold that title is in the riparian owner. Some states hold that the riparian owner has title to low water while the state owns the bed between low water marks. 78 Am.Jur 2d 817, Waters, § 380; 78 Am.Jur.2d 818, Waters, § 381; 78 Am.Jur.2d 827, Waters, § 386.

There is no uniformity among the states as to the right of the state to dispose of the bed of navigable fresh water streams. 78 Am.Jur. 2d 844, Waters, § 401.

The confusion is best summarized as follows:

> "There has been much diversity of opinion and of positive laws in this country as to the ownership of land under waters, chiefly because, as hereinafter pointed out, each state in this country has been at liberty

> to determine over what submerged lands its sovereign prerogative of ownership should be exercised. In some states statutes have been passed modifying or abrogating the common-law rules and presumptions, while in others the courts have been permitted either to follow the common-law or civil-law rules relating to boundaries, or to establish their own doctrines."
>
> 78 Am.Jur.2d 814, Waters, §378

While it is established law that the individual states may dispose of the beds of navigable streams as each determines, the law is not settled as to what the state owns that it may dispose of. 78 Am.Jur.2d 844, Waters, § 401. This is a question of law. Bonelli Cattle Company v. Arizona, 414 U.S. 313, 94 S.Ct. 517, 38 L.Ed.2d 534, 536. The limits of ownership should be determined as a matter of federal law. Particularly, the right of a state to charge royalty for sand, gravel and other materials removed for commercial purposes should be spelled out.

Respectfully submitted,

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October 1975

APPENDIX A

28 U.S.C. § 1257: State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

* * * * *

28 U.S.C. § 2101: Supreme Court; time for appeal or certiorari; docketing; stay

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time

for applying for a writ of certiorari for a period not exceeding sixty days.

* * * * *

OREGON STATUTES

105.005 Right of action. Any person who has a legal estate in real property and a present right to the possession thereof, may recover possession of the property, with damages for withholding possession, by an action at law. The action shall be commenced against the person in the actual possession of the property at the time, or if the property is not in the actual possession of anyone, then against the person acting as the owner thereof.

105.010 Contents of complaint. The plaintiff in his complaint shall set forth:

(1) The nature of his estate in the property, whether it be in fee, for life, or for a term of years; including, when necessary, for whose life and the duration of the term.

(2) That he is entitled to the possession thereof.

(3) That the defendant wrongfully withholds the property from him to his damage for such sum as is therein claimed.

(4) A description of the property with such certainty as to enable the possession

thereof to be delivered if there is recovery.

APPENDIX B

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF BENTON

STATE OF OREGON, Acting by and through the State Land Board, Plaintiff	)
v.	) No. 21512
CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation, Defendant.	) Judgment

The above entitled matter having come on regularly for trial before the Court without a jury; plaintiff appearing through its attorneys Lee Johnson, Attorney General; by Peter S. Herman, Senior Counsel; and Philip J. Engelgau, Assistant Attorney General; defendant appearing through its president, John H. Gallagher, and through its attorneys, Robert Mix and George Mead; and the Court having considered the evidence of the parties and the arguments of counsel and having heretofore denied defendant's motion to reconsider the Court's previous rulings on the pleadings, and the Court having entered its Findings of Fact and Conclusions of Law and its Supplement thereto;

NOW, THEREFORE, the Court does hereby order and adjudge as follows:

I.

Defendant's motion asking the Court to reconsider its previous rulings on the pleadings is denied.

II.

PARCEL I

Plaintiff is the owner in fee simple of Parcel I, and is entitled to the immediate possession thereof; it is THEREFORE ORDERED that plaintiff have the immediate possession thereof from the defendant. A legal description of Parcel I is annexed hereto as Exhibit A and made a part hereof. (Description omitted.)

It is FURTHER ORDERED that plaintiff do have and recover from the defendant the sum of Seventy-one Thousand Seven Hundred Fifty Dollars ($71,750.00) as damages for the wrongful withholding of possession of Parcel I by the defendant from July 1, 1959 to the date of this Judgment.

III.

PARCELS 2A, 2B and 2C

Defendant is the owner in fee simple and entitled to the possession of Parcels 2A, 2B and 2C. A legal description of Parcels 2A, 2B and 2C is annexed hereto as Exhibits B, C and D, respectively, and made a part hereof. (Descriptions omitted.)

IV.

PARCEL 3

Plaintiff is the owner in fee simple of Parcel 3 and was entitled to the immediate possession of said parcel prior to July 1, 1963, the beginning date of the ten year lease between the parties covering said parcel. A legal description of said parcel is annexed hereto as Exhibit E and made a part hereof. (Description omitted.)

It is THEREFORE ORDERED that Plaintiff do have and recover from the defendant the sum of Seven Thousand Dollars ($7,000.00) as damages for the wrongful withholding of possession of said parcel by the defendant on and between July 1, 1959, and July 1, 1963.

V.

PARCEL 4

Plaintiff is the owner in fee simple of Parcel 4 and is entitled to the immediate possession of said parcel; it is THEREFORE ORDERED that plaintiff have the immediate possession thereof from the defendant. A legal description of Parcel 4 is annexed hereto as Exhibit F and made a part hereof. (Description omitted.)

VI.

PARCEL 5

Plaintiff is the owner in fee simple of Parcel 5 and entitled to the immediate possession of Parcel 5; it is THEREFORE ORDERED that plaintiff have the immediate possession thereof from the defendant. A legal description of Parcel 5 is annexed hereto as Exhibit G and made a part hereof. (Description omitted.)

It is FURTHER ORDERED that plaintiff do have and recover from the defendant, the sum of One Thousand One Hundred Twenty-five Dollars ($1,125.00) for the wrongful withholding of possession of said parcel by the defendant from July 1, 1959, to the date of this Judgment.

VII.

PARCEL 6

Plaintiff is the owner in fee simple of Parcel 6 and is entitled to the immediate possession of Parcel 6; it is THEREFORE ORDERED that plaintiff have the immediate possession thereof from the defendant. A legal description of Parcel 6 is annexed hereto as Exhibit H and made a part hereof. (Description omitted.)

It is FURTHER ORDERED that plaintiff do have and recover from the defendant the sum of Two Thousand Six Hundred Twenty-five

Dollars ($2,625.00) for the wrongful withholding of possession of said parcel by the defendant from July 1, 1959, to the date of this Judgment.

VIII.

PARCEL 7

Plaintiff is the owner in fee simple of Parcel 7 and is entitled to the immediate possession of Parcel 7; it is THEREFORE ORDERED that plaintiff have the immediate possession thereof from the defendant. A legal description of Parcel 7 is annexed hereto as Exhibit I and made a part hereof. (Description omitted.)

IX.

PARCEL 8

Defendant is the owner in fee simple and entitled to the possession of Parcel 8. A legal description of Parcel 8 is annexed hereto as Exhibit J and made a part hereof. (Description omitted.)

X.

PARCEL 9

Plaintiff is the owner in fee simple of Parcel 9 and is entitled to the immediate possession of Parcel 9; it is THEREFORE ORDERED that plaintiff have the immediate possession thereof from the defendant.

Defendant disclaims any interest in said parcel. A legal descripton of said parcel is annexed hereto as Exhibit K and made a part hereof. (Description omitted.)

Based on the above items of damages awarded plaintiff, it is ORDERED AND ADJUDGED that plaintiff do have and recover from the defendant the grand total of Eighty-two Thousand Five Hundred Dollars ($82,500.00) and its costs and disbursements herein incurred which are taxed in the sum of $371.50.

Dated this 28th day of July, 1972.

/s/ Richard Mengler
Circuit Judge

APPENDIX C

OREGON COURT OF APPEALS

SCHWAB, C. J.

This is an action at law in ejectment by the state pursuant to ORS 105.005, et seq, to recover possession of 11 described parcels of real property constituting portions of the bed of the Willamette River near Corvallis, and to recover damages for the reasonable value of the use of such parcels.

In 1958 the state filed a suit to quiet title to the land adjoining certain lots, which lots constitute a portion of the property in dispute now. In 1959, at trial, the case was dismissed without prejudice on motion for a voluntary nonsuit for failure of proof. In 1960 the state filed a suit for an accounting and an injunction covering the area in dispute in the case at bar. This case was voluntarily dismissed in 1961 by the state before it was at issue.

The first complaint in this action was filed by the state on June 7, 1965. In the complaint the portion of the riverbed in dispute was described as one parcel; the portions of the riverbed now constituting Parcels 2A, 2B and 2C were omitted. Instead of answering, the defendant filed a complaint in equity seeking to permanently enjoin the state's ejectment action. The state demurred to the complaint. The trial

court overruled the demurrer and a decree was entered in favor of Corvallis Sand and Gravel. On appeal the Supreme Court reversed. Corvallis Sand & Gravel v. Land Board, 250 Or 319, 439 P2d 575 (1968).

On December 23, 1969, the plaintiff filed its first amended complaint in ejectment in which it described the riverbed it sought to recover as 11 separate parcels and claimed damages for the use of each parcel. On July 7, 1970, the defendant filed its answer, denying the allegations of the complaint and raising 12 affirmative defenses. After procedural disputes leading to several amended answers, trial was held before the court without a jury, commencing October 11, 1971.

On May 25, 1972, the trial court issued a memorandum opinion awarding various parcels to each party and setting the amount of damages for the previous use by defendant of those parcels awarded to the state. Findings of fact and conclusions of law were entered on June 19, 1972. The court supplemented these findings on July 28, 1972, and judgment was entered the same day. The state appeals from that portion of the order which awards parcels described for the purposes of this litigation as 2A, 2B and 2C to the defendant, on the ground that it erred in finding that these parcels were formed by avulsion, and from the failure of the trial court to award interest on the money judgment from the date of taking by defendant to the date of the

judgment. The defendant cross-appeals from a variety of procedural rulings of the court, and the award of damages. For the reasons which follow, we affirm the trial court in all its rulings and its judgment with the exception of one relatively minor item of damages which we reverse.

I. Scope of Review

The scope of appellate review of the facts presented in this case was stated in Reif v. Botz, 241 Or 489, 496, 406 P2d 907 (1965):

> "*** On appeal in an action at law from findings of fact by a trial court sitting without a jury, this court cannot again place the evidence on the scales to see which side preponderates. We must confine ourselves to a search of the record for some evidence to support the findings. If we so find *** those findings cannot be disturbed."

See also, May v. Chicago Insurance Co., 260 Or 285, 490 P2d 150 (1971); State Highway Com. v. DeLong Corp., 9 Or App 550, 495 P2d 1215, Sup Ct review denied (1972), cert denied 411 US 965 (1973). The various findings of fact as to the formation of the various parcels and the amount of material removed from each parcel must be reviewed in light of this standard.

Much of the dispute in this case centers around the difference in testimony of

the expert witnesses of the parties. The credibility of the various witnesses and the weight to be given to their testimony is a matter for the trial court and will not be passed upon again by this court in a law action. Armbrust v. Travelers Ins. Co., 232 Or 617, 376 P2d 669 (1962).

Finally, we should note that when we state facts in this case, we are using the findings of fact of the trial court in all instances in which there is a conflict in the evidence.

II. Ownership of the Parcels in Dispute

This litigation involves ownership questions of certain parcels of the bed of the Willamette River[1] near Corvallis, Oregon, which parcels lie between ordinary high watermarks in an area bounded by the Mary's River on the north or downstream end, and the City of Corvallis Water Treatment Plant to the south or upstream end. For the purposes of this litigation, the state, in its complaint, divided this section of the river into 11 separate parcels[2].

[1]Neither party contests the fact that the Willamette River is navigable in the area involved in this litigation. For a comprehensive view of the geography of the disputed area, see map at 28.

[2]For a discussion of the propriety of splitting the disputed area into separate

On appeal, the ownership of eight of these parcels in in issue.

In order to put the ownership question into perspective, a brief overview of the facts is necessary. Prior to the latter part of 1909, the northerly portion of the Willamette River now shown on the attached map as the East Channel was the main channel of the river. Prior to 1909 the main channel veered to the east from a point just south of what is shown as Parcels 2A, 2B and 2C, went around the east side of Fischer Island and rejoined what is now the main channel at a point to the northwest of Parcels 2A, 2B and 2C. The area shown on the map as Parcels 2A, 2B and 2C, and described as the Fischer Cut area was a minor non-navigable channel which was submerged only seasonally. However, following a storm and flood in late 1909, the area known as Fischer Cut became the main channel of the river and the East Channel gradually became non-navigable.

With regard to Parcels 2A, 2B and 2C, the issue involves the consequences of this change of channels, with the state claiming ownership by virtue of its sovereignty over navigable waters and the application of an erosion principle. The defendant contends that the change was actually avulsive and that, in any event, the state's sovereignty does not extend to the bed of the river

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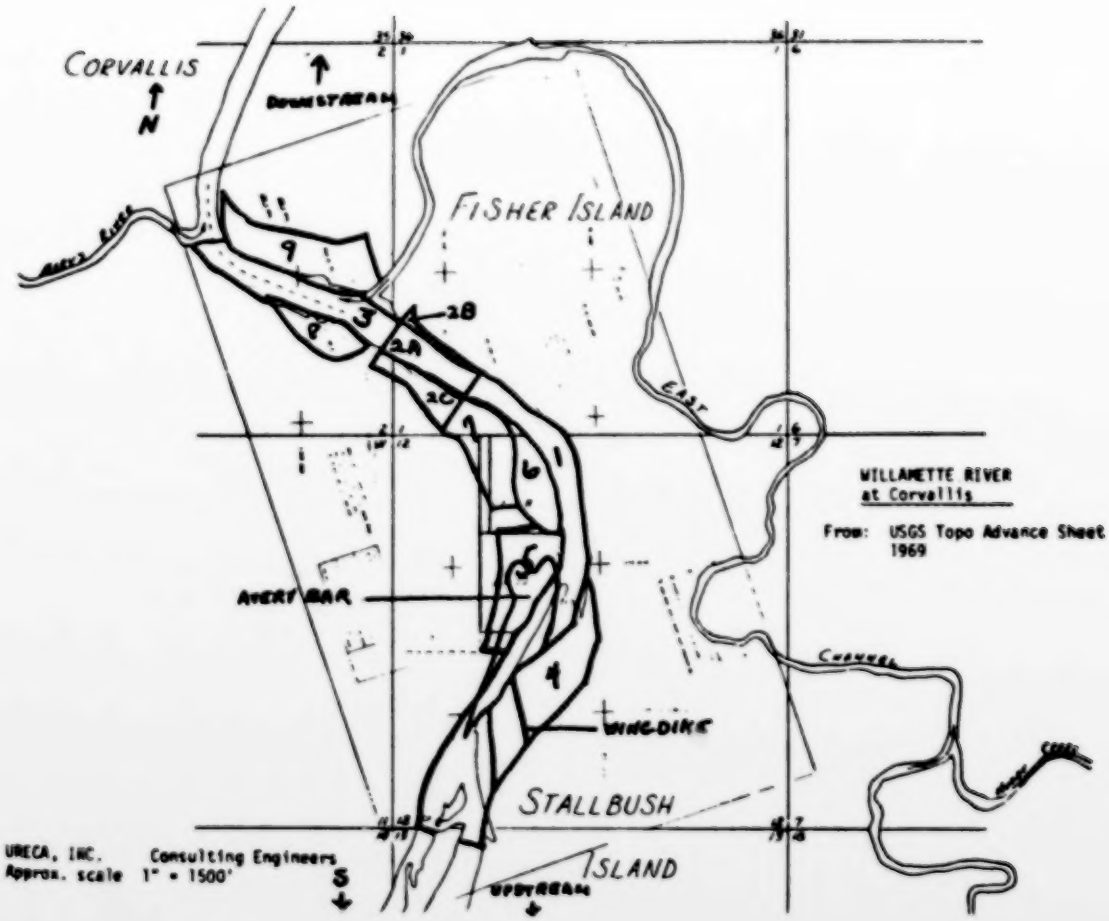
parcels and causes of action, see pp 63-65, infra.


CORVALLIS
N
DOWNSTREAM
FISHER ISLAND
EAST
AVERY BAR
WHEDIKE
STALLBUSH
ISLAND
UPSTREAM
WILLAMETTE RIVER
at Corvallis
From: USGS Topo Advance Sheet
1969
URECA, INC. Consulting Engineers
Approx. scale 1" = 1500'

included within these parcels.

With regard to other of the parcels the issue is who was holder of the original title. Finally, with some parcels, the issue arises because of formations of islands within the bed of the river, accretions thereto, removal of gravel deposits by the railroad, the construction of a wingdike in 1948 by the Army Corps of Engineers, and the general erosive and accretive processes of the river over the course of time.

The trial court awarded Parcels 2A, 2B and 2C to the defendant, and all the others to the state. Both parties raise a variety of factual and legal contentions in opposition to the findings and conclusions of the trial court. We will treat each parcel separately recognizing that, to some degree, the factual discussion as to each parcel will overlap somewhat the general discussion above.

A. Parcels 2A, 2B and 2C (Fischer Cut)

As indicated on the map, Parcel 2A is comprised of bottom land of the Willamette River between ordinary low water. Parcel 2B is riverbed between ordinary high and ordinary low water on the right bank of the river. Parcel 2C is riverbed between the ordinary high water and ordinary low water on the left bank of the river. The trial court made the following findings of fact

concerning the area within the Fischer Cut:

"1. Fischer Island from 1853 to 1909 was a peninsula-like formation around which the Willamette River coursed.

"2. By 1890 a clearly discernible overflow channel over the neck of the peninsula had developed known as Fischer Cut.

"3. In 1890 Fischer Cut would have had to be cleared of driftwood and willow growth before it could possibly accommodate the flow of the river. The Fischer Cut Channel was dry at low water, or below the five-foot stage, and carried water only at intermediate or high stages of the river.

"4. In January of 1906 the Fischer Cut Channel was in practically the same location as it was in 1890. It was estimated then that roughly one-quarter of the flow of the river was carried through Fischer Cut.

"5. Between 1890 and 1909 the high water overflow through Fischer Cut did not sufficiently clear Fischer Cut to allow for the full flow of the river and the river continued to flow around Fischer's Island during that period.

"6. As a result of a flood of November 25, 1909, the river suddenly and

with great force and violence converted Fischer Cut into the main channel of the river.

"7. The change was not gradual and imperceptible but was a rapid and violent change of course, avulsive in character and constituted an avulsion.

"8. Parcels 2A, 2B and 2C combined are included in the area known as Fischer Cut."

The state argues that ownership of the entire Fischer Cut area passed to the state by virtue of its sovereignty over navigable waters regardless of the manner of the formation of the cut. It also argues that regardless of the state's sovereignty, title to the Fischer Cut river bottom passed to the state because the Fischer Cut did not result from an avulsive change since an existing channel of the river was present prior to its enlargement. Defendant argues that the change was avulsive and that, in any event, Bonelli Cattle Co. v. Arizona, 414 US 313, 94 S Ct 517, 38 L Ed 2d 526 (1973), controls the ownership question.

1. The Sovereignty Issue

Under the equal-footing doctrine, as new states were admitted to the Union, they entered with the same rights, sovereignty and jurisdiction as the original states possessed within their respective borders. Accordingly, under the equal-footing

doctrine, title to the lands beneath navigable waters passed from the federal government to the state of Oregon upon its admission to the Union. Bonelli, 38 L Ed 2d at 534; An Act for the Admission of Oregon into the Union, ch 33, 11 Stat 383. Further, under the Submerged Lands Act, 43 USC § 1301(a)(1), the federal government quitclaimed all federal title to lands beneath navigable streams, as modified by accretion, erosion or reliction. By virtue of its sovereignty over navigable waters, the state contends that its title to the bed of the Willamette River follows the course of the river wherever it may move. Otherwise, the state argues, the bed will become a "checkerboard" of public and private ownership, seriously impairing the public use of the waters.

Questions of title to beds of navigable rivers must be evaluated in light of Bonelli Cattle Co. v. Arizona, supra. In Bonelli, the Supreme Court recognized the principle that it would be left to the states to determine what rights they would accord riparian owners in the beds of navigable streams which under federal law belong to the state. However, the question of how far the state's sovereign right extends under the equal-footing doctrine and under the Submerged Lands Act was found to involve a question of right asserted under federal law and, thus, federal common law would apply.

While Bonelli involved title to lands formerly under the main channel that had since become dry, the basic public policy discussion is equally applicable to the case where certain lands which were not under water are presently under water. The court in Bonelli first noted that, historically, title to the beds beneath navigable waters is held by the sovereign as a public trust for protection of navigation and related purposes. The court continued:

> " 'Such waters *** are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing ***.' Shively v. Bowlby *** [152 US 1, 11, 38 L Ed 331, 14 S Ct 548 (1894)]."
>
> "The State's title is to the 'riverbed as a bed' ***." Bonelli Cattle Co. v. Arizona, supra, 38 L Ed 2d at 536.

The fundamental purpose of the original grant involves navigational and related interests and the state can often protect these interests by holding a navigational servitude rather than by holding title to the bed.[3]

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[3]The court directs the reader to Note, Artificial Additions to Riparian Land:

While the extent of the state's interest should not be narrowly construed because it is denominated a navigational purpose, see, Bonelli Cattle Co. v. Arizona, supra, n 15, the implication is clear that the other purposes must somehow be related to the navigational purpose.

The only public purpose cited by the state deals with the question of public recreation in terms of wading, fishing, boating or swimming. However, such rights can be controlled under the navigational purpose doctrine, and title to the bed, asserted here only for the extraction of royalty payments, is not necessary. Certainty of title and other arguments raised by the state under its sovereignty argument do not relate to this legitimate state interest in control of navigation and fishing.

The first portion of Bonelli thus stands for several basic propositions. First, the extent of title to submerged lands and navigable waterways must be determined by federal common law. Second, the state's interest in the bed of navigable waters is basically that of the control of navigation, fishing and other related public goals. So

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Extending the Doctrine of Accretion, 14 Ariz L Rev 315 (1972), wherein the author speaks in terms of title being burdened with the state's "navigational easement." See, Bonelli Cattle Co. v. Arizona, 414 US 313, 94 S Ct 517, 38 L Ed 2d 526, 536, n 12 (1973).

the sovereignty principle alone will not support title of the state in these parcels. Thus we must turn to Bonelli and other federal cases to determine whether title to the bed passed to the state under the facts presented in the case at bar.

2. Nature of the Change in the River's Course

The court in Bonelli first noted that federal law recognizes the doctrine of accretion whereby the grantee of land bounded by a body of navigable water acquires a right to any gradual accretion formed along the shore. The court then discussed a number of interrelated policy reasons for the application of doctrine of accretion, which reasons refer to the risk a riparian owner runs that his land could be eroded by the action of the adjoining waterway. Under the court's analysis loss of land on a navigable waterway by a riparian owner to erosion would result in title to the bed passing to the state. See, Bonelli Cattle Co. v. Arizona, supra, 38 L Ed 2d 534, 536-37.

As defined in Bonelli, 38 L Ed 2d at 538, and other federal cases,[4] the doctrine of accretion requires the gradual, imperceptible accumulation of land on a navigable river bank. As found by the trial

[4] See, Philadelphia Co. v. Stimson, 223 US 605, 32 S Ct 340, 56 L Ed 570 (1912).

court and admitted by the state, there was no gradual addition or accumulation of land in this case. Rather, the river started to flow through a new channel. Since the accretion doctrine does not apply, the question is what this change to a new channel is denominated under federal common law and how such a change affects title to the riverbed.

One possibility is that this change was avulsive, as found by the trial court. As defined in Bonelli, 38 L Ed 2d at 539, an avulsion occurs where a stream suddenly and perceptibly abandons its old channel. Other federal cases state that such change must be visible in its progress. See, St. Louis v. Rutz, 138 US 226, 11 S Ct 337, 34 L Ed 941 (1891). Such an avulsive change does not affect title to the lands submerged by the water since this is not one of the risks run by a nonriparian landowner. Bonelli Cattle Co. v. Arizona, supra; Philadelphia Co. v. Stimson, 223 US 605, 32 S Ct 340, 56 L Ed 570 (1912); St. Louis v. Rutz, supra. While title does not change, the submerged lands do become subject to the public right of navigation, fishing and other related public purposes. See discussion, supra, at 34-35. The trial court found that the change in the Fischer Cut area was sudden and perceptible and, thus, constituted an avulsion. We find evidence in the record to support this conclusion.[5]

[5]The state relies heavily upon Purvine v. Hathaway, 238 Or 60, 393 P2d 181 (1964),

But even if the doctrine of avulsion does not adequately fit the facts in the case at bar, there is a middle course between the avulsion and accretion doctrines which perhaps more adequately reflects the facts presented. This is the so-called exception to the accretion rule announced in Commissioners v. United States, 270 F 110, 113-14 (8th Cir 1920):

> "*** [The accretion rule] is applicable to and governs cases where the boundary line, the thread of the stream, by the slow and gradual processes of erosion and accretion creeps across the intervening space between its old and its new location. To this rule, however, there is a well-established and rational exception. It is that, where a river changes its main channel, not by excavating, passing over, and then

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to support its position that this change was not avulsive in nature. First, it should be noted that federal common law controls ownership questions under Bonelli and, thus, state cases are of limited applicability. Second, Purvine did not involve the question of the state's ownership of the riverbed but rather involved boundary questions. Finally, the court found that an avulsive change had not been proved on the facts and that, for policy reasons, the court did not wish to apply the avulsion theory because of the effect that theory could have on boundary questions in the future.

> filling the intervening place between its old and its new main channel, but by flowing around this intervening land, which never becomes in the meantime its main channel, and the change from the old to the new main channel is wrought during many years by the gradual or occasional increase from year to year of the proportion of the waters of the river passing over the course which eventually becomes the new main channel, and the decrease from year to year of the proportion of its waters passing through the old main channel until the greater part of its waters flow through the new main channel, the boundary line between the estates remains in the old channel subject to such changes in that channel as are wrought by erosion or accretion while the water in it remains a running stream ***."

While the court treated this as a form of accretion, the result is the same as avulsion in that the boundary line was found not moved to the new main channel but rather remained in the old main channel. In fact, at least one court claims that the rule in Commissioners was a rule of avulsion. See, Durfee v. Keiffer, 168 Neb 272, 95 NW2d 618 (1959). The rule of Commissioners was apparently recognized in Kansas v. Missouri, 322 US 213, 64 S Ct 975, 88 L Ed 1234 (1944).

Since the rule of Commissioners yields the same outcome as the avulsive theory,

the same result would apply as to the title of the newly submerged lands, namely, that it remains in the former owner and does not pass to the state. The government will hold the paramount navigational servitude, but will not become the owner of the submerged lands.

3. Conclusions

There are several conclusions we distill from Bonelli and other cases dealing with navigable waterways. First and most important is that the state's right in the bed of the river is a limited right and relates to a navigational or related purpose. Lands granted to the state of Oregon upon its admission in 1859 which were under water and are still under water belong to the state of Oregon at this time. While the grant of the bed in 1859 is not absolutely necessary for the paramount public purpose of control of navigation, it was, perhaps, the way the Congress felt the question of title to riverbeds should be determined. It can also be determined from Bonelli that where a bed of a river shifts by a slow process of erosion or accretion, title of the state to the bed of the river follows the change. However, where there is an avulsive change or a change that, under Commissioners, is treated like an avulsive change, the state does not obtain title to land under the water as it presently flows. The state's interest in navigation and other related purposes does not extend to a need for ownership of the riverbed.

Adequate evidence was introduced to support either the theory of avulsion as found by the trial court or a situation similar to that in Commissioners. But under either theory, the outcome is the same - the ownership of the land under the river does not change. The ownership of the overflowed lands in Parcels 2A, 2B and 2C remains with the owner of those lands before the changes of 1909, subject only to the paramount navigational servitude held by the state. This portion of the judgment of the trial court is affirmed.

B. Parcel No. 1

Parcel No. 1 lies between the present lines of ordinary low water with its upstream limits delineated by a line at right angles to the river and opposite the City of Corvallis Water Treatment Plant, and its downstream limits coinciding with the upstream limits of Parcel 2A. The trial court ruled that Parcel 1 belonged to the state. There are three separate issues involved in the ownership question of Parcel No. 1: (1) the length of the Fischer Cut; (2) the ownership of an area denominated the Avery Bar; and (3) the effect of the U.S. Army Corp of Engineers' wingdike. These will be treated separately.

1. Length of the Fischer Cut

The defendant contends that the change of 1909, which it terms an avulsion, extended a distance of 3200 feet upstream from

the downstream ends of Parcels 2A, 2B and 2C, and, therefore, included a portion of Parcel 1. The trial court ruled that the Fischer Cut did not extend upstream above Parcels 2A, 2B and 2C. However, the court did find that a small portion of Parcel 3 was included within the limits of Parcels 2A, 2B and 2C. This makes the cut area approximately 1600 feet in length. There is ample evidence both in the maps and in testimony of the state's expert witness to support this finding. The cut did not extend into Parcel 1.

2. The Avery Bar Issue

The Avery Bar area extends from Parcel 5 through Parcel 1. The defendant contends that when the Avery Bar was removed for gravel purposes by the railroad in the early twentieth century, the river moved back in over the excavated land. It argues that Avery Bar arose as an accretion from Parcels 5 and 6 which the defendant also contends it owns and, as such, when it was covered by water, it still belonged to the defendant. The trial court made the following finding of fact:

" *****

"3. Prior to 1913, a large portion of Parcel 1 consisted of a formation known as Avery Bar.

"4. That portion of the bed of the Willamette River occupied by Avery Bar

was not a part of Fischer Cut, discussed under Parcels 2A, 2B and 2C.

"5. Prior to 1913, Avery Bar originated as an island on the bed of the river below the lines of ordinary low water.

"6. Subsequently and by accretion, prior to 1913, the island joined the uplands on the left bank at the ordinary low water mark in front of government lots 9 and 10 [Parcel 5].

"7. Thereafter, a point bar developed on top of the joinder.

"8. Thereafter, the railroad in 1913 removed most of the bar by dredging large quantities of rock and gravel.

"9. The state owned from ordinary high water mark to ordinary low water mark in front of government lots 9 and 10 [ownership of these lots discussed infra at 22-25.

"10. The point bar, known as Avery Bar, accreted to land owned by the state, that is, to the island which had originated in the bed of the river below ordinary low water.

"11. Thereafter, it is not material whether the accreted mass became covered with water from whatsoever cause, be it the wingdike constructed

by the Corps of Engineers in 1948, discussed under Parcel 4, or the dredging of Avery Bar by the railroad in 1913-1914."

It is established that if an island or dry land forms upon that part of the bed of a river which is owned in fee by the riparian proprietor, the same is a property of said riparian proprietor. St. Louis v. Rutz, supra, 138 US at 245. Further, the owner of an island is entitled to land added thereto by accretion. 65 CJS 261, Navigable Waters § 82(6).

Once again the facts settle into separate positions taken by the parties' expert witnesses. The state's witness claimed that the Avery Bar started as an island and that the deposits accreted to the island. The defendant's witness, on the other hand, contended that Avery Bar was an accretion to the uplands, namely Parcels 5 and 6, which the defendant claims it owns. There is evidence to support the trial court's finding and it is affirmed.

3. 1948 Corps of Engineers' Wingdike Formation

Much of this argument overlaps the Avery Bar argument, supra. The defendant contends that a wingdike constructed by the Corps of Engineers in 1948 further covered part of Parcel 1 made up of the Avery Bar area. It again argues that Avery Bar was an accretion to the uplands which the defendant owned and

that the avulsive change caused by the wingdike allowed ownership of the land of Avery Bar to continue in defendant. The trial court's finding of fact in the matter is set out in full, supra. There is evidence to support these findings.

C. Parcel 3

Parcel 3 lies in the bed of the river between ordinary low watermarks and runs from the upstream end of Parcel 2A past the confluence with the East River to a point approximately equal to the confluence with Mary's River. On July 1, 1963, the state leased to the defendant for a term of ten years that portion of Parcel 3 beginning at the confluence with the East River and extending downstream for approximately 4,000 feet. The trial court split Parcel 3, awarding the downstream portion from the confluence with the East River to the state, and the upstream portion from the confluence of the East River to the defendant, finding that it was within the Fischer Cut. The state appeals from that portion of the decree awarding the area upstream of the East River to defendant. There is evidence supporting a finding that the portion upstream from the confluence of the East River was included within the Fischer Cut. Under Bonelli and related cases, title to that land remainded in the original owner.

D. Parcel 4

On appeal, defendant has abandoned all

claim to this parcel so it need not be discussed herein.

E. Parcel 5

Parcel 5 lies in the bed of the river between the lines of ordinary high and ordinary low along the left bank of the river. The trial court awarded this parcel to the state below the ordinary high watermark. The defendant argues:

1. That the northerly one-third of Parcel 5 is included in the avulsive change of Fischer Cut;

2. That a portion of Parcel 5 is included in the Avery Bar area; and

3. That the Corps wingdike of 1948 was an artificial change of channel which worked no change of title, and was an artificial avulsion.

The trial court made the following findings of fact:

> "1. Parcel 5 lies in the bed of the river between the lines of ordinary high and ordinary low along the left bank of the river.
>
> "2. Inasmuch as Parcel 5 fronts government lots 9 and 10, defendant's predecessors in title acquired no right therein under laws of 1874, page 76.

The question of the length of the Fischer Cut and the formation of the Avery Bar has already been discussed above. There is evidence to support the trial court's ruling that Parcel 5 was not within the avulsive change and that the Avery Bar did not form as an accretion to Parcel 5.

There are still several portions of Parcel 5, however, that do not fall in either the Fischer Cut or Avery Bar category. The question to be resolved as to these areas involves a United States patent to certain lands and Acts of the Oregon legislature in 1874 and 1878. In 1874, the legislature granted the area on the Willamette River between low and high water to adjacent riparian owners. General Laws of Oregon 1874, p 76.

In 1875, defendant's predecessor in interest, one Norring, filed for a homestead on Government Lots 9, 10 and 12; Parcel 5 is the area between high and low water fronting Lots 9 and 10. On October 18, 1878, the Governor signed a law repealing the statutory grant of land between high and low water on the Willamette River. General Laws of Oregon 1878, § 34, p 54. The patent to Government Lots 9 and 10 was not issued to Norring by the United States government until April of 1882. The question thus presented is whether Norring was an "owner" within the contemplation of the Oregon statute when he settled on the property in 1875 and, if not, did the patent obtained in 1882 relate back to his original entry in 1875 rendering him an owner

within the contemplation of the statute.

In support of his contention that Norring was an "owner", defendant relies upon Faull v. Cooke, 19 Or 455, 26 P 662, 20 Am St R 836 (1890), in which the court determined what rights a homesteader acquired in land by virtue of his homestead settlement and subsequent compliance with the Act of Congress granting homesteads to actual settlers upon the public lands of the United States and the issuance to him of a patent therefor by the United States. In Faull the court found that a homestead patent related back to the date of settlement. However, the question here concerns not homestead rights but the granting of the state lands between high and low water to the owner of riparian lands bordering thereon. State v. McVey, 168 Or 336, 121 P2d 461, 123 P2d 181 (1942), speaks more nearly to the point. In McVey the court considered the question of ownership of a gravel bar between high and low water. The court first noted that General Laws of Oregon 1874, p 76, did not vest title in the bed between high and low water in the federal government. The court then construed the statute and tried to determine the intent of the legislature and the historical background of the legislation. The court first noted in McVey, 168 Or at 353-54:

> "***It was undoubtedly due to the fact that many riparian owners along the Willamette, Coos, Coquille and Umpqua

> rivers had treated the river beds between high and low water marks as private property and had sometimes improved such parts of the river beds by the erection of expensive structures, that the legislature amended the 1872 enactment so as to protect them and their investments by making a grant of the beds of those rivers above low water mark to the riparian owners ***.
>
> "The legislature was concerned with private ownership of property abutting upon tide lands and property adjacent to the beds of certain designated navigable rivers. It was not concerned with the United States as owner of any such lands. *** It may be noted *** that the act did not grant to a settler the right to purchase the title land until after he had received a patent from the federal government." (Emphasis supplied.)

Norring did not become an "owner" until after he had received the patent from the federal government. Since he did not receive the patent until after the date of the repeal of the Act authorizing him to obtain ownership of the land between high and low watermarks, he was not an "owner" within the terms of the statute.

The defendant's second argument is that the patent received by Norring in 1882 related back to his entry on March 15, 1875, when the statute granting ownership to the

low water level was in effect. Defendant again cites numerous cases involving homestead law in which the patent does relate back to the date of entry insofar as it cuts off a title of one who enters after the original entryman. As made clear in State v. McVey, supra, the disposition of these lands is controlled by state law, and the doctrine of relation back will not apply.

Defendant makes reference to ORS 105.070 in support of his relation back claim. That statute declares that in an action at law for the recovery of the possession of real property, if either party claims the property as a donee of the United States under the Donation Law, such party from the date of his settlement on the property is deemed to have a legal estate and fee in the property. This statute originated in 1862 in General Laws of Oregon, § 329, p 230 (Deady 1845-1864), well before the statutes in question here and the decision in State v. McVey, supra. Also, this refers to lands owned by the United States government and passed under the homestead acts. It does not control the later state legislative enactments dealing with the state's land between high and low water.

F. Parcel 6

Parcel 6 also lies in the left bank of the river and consists of land between ordinary high and ordinary low water. Defendant contends that Parcel 6 is in actuality Government Lot 11 of Section 12 which was

patented by the defendant's predecessor in title before the repeal of the 1874 statute. The state admits that the patent on Government Lot 11 was completed prior to the repeal of the laws of 1874, but contends that Government Lot 11 has eroded away completely and that Parcel 6 arose from an island in the river that joined by accretion to the uplands.

The trial court made the following findings of fact:

> "1. Parcel 6 lies in the bed of the river between the lines of ordinary high and ordinary low water along the left bank of the river.
>
> "2. Parcel 6 is not within the avulsive channel of Fischer Cut.
>
> "3. Defendant's predecessor in title acquired no right therein by virtue of Laws of 1874, p 76.
>
> "4. Parcel 6 formed in the bed of the river after 1878 and accreted to the uplands at the low water mark on the frontage of government lots 10, 11 and 12 of Section 12. The accreted formation cut off the submersible lands fronting what remained of Government lot 11."

Both parties agree that defendant's predecessor in title acquired rights in Government Lot 11 and the submersible lands

fronting it, so paragraph 3 of the findings of fact is incorrect. However, there was adequate evidence introduced to support the finding that Government Lot 11 eroded away and that Parcel 6 formed in the bed of the river and accreted to the uplands. So long as this parcel remains submersible, title will remain in the state. See, Bonelli Cattle Co. v. Arizona, supra.[6]

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[6]The court in Bonelli adopted the doctrine of re-emergence:

> "Under the doctrine of re-emergence, when identifiable riparian land, once lost by erosion, subsequently re-emerges as a result of perceptible change in the river course, title to the surfaced land revests in its former owner ***. The re-emergence doctrine has been accepted by a number of States ***. Because of the limited interest of the State in the former riverbed, we have held the doctrine of avulsion inapplicable to this suit between the State and a private riparian owner, who is seeking title to surfaced land identifiable as part of his original parcel. In that sense, we have embraced the re-emergence concept." (Emphasis supplied.) 38 L Ed 2d at 541, n 28.

In the case at bar, no evidence was introduced to show that any portion of Government Lot 11 was above ordinary high water. To the extent that a portion of Lot 11 is

G. Parcel 7

Parcel 7 is in an area between ordinary high and ordinary low water on the left side of the river. It consists of part of Govenment Lot 13, Section 12, and the Alexander Donation Land Claim. The defendant contends on appeal only that Parcel 7 was within the alleged avulsive change of 1909 occurring in the Fischer Cut area and, therefore, should belong to the defendant. The trial court found that it was not within the cut. There is evidence to support this finding.

III. Procedural Questions Relating to Damages

The defendant raises several assignments of error relating to the damages awarded by the court for those parcels given to the state. The defendant first contends that the state's failure to use an ad damnum clause in its pleading required the trial court to exclude all evidence on damages. This contention was decided adversely to defendant's position by Hollopeter v. Palm, 134 Or 546, 550, 291 P 380, 294 P 1056 (1930), appeal dismissed 284 US 572 (1931), wherein the court concluded that the entire omission of the ad damnum clause was

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now emerged or re-emerges in the future, title to that portion could return to the defendant. For possible limitations on this return of title, see, Annotation, 41 ALR 395 (1926). On the facts as presented we need not settle that question now.

immaterial where, as here, after a cause of action is set out there is a prayer for a specified amount.

Defendant also argues that the court erred in denying its motion to exclude evidence from the case on damages which occurred after the filing of the complaint in the original case in June of 1965. Damages in ejectment proceedings are provided for by ORS 105.030, which statute specifically permits the recovery of damages from the date of the commencement of the action to the giving of a verdict.

The defendant next contends that the court erred in denying its motion to exclude evidence relating to quantities of gravel dredged from the river. Defendant claims that since the state has pleaded as the measure of damages the reasonable value of the use of the premises for each year or, as admitted by defendant, rental value, it cannot introduce proof as to amount of gravel removed since that does not relate to rent. However, it is noted in Newell on Ejectment, ch XIX, § 3, 606-07 (1892):

> "Whatever would be rent, as between landlord and tenant, is mesne profits as between the parties in ejectment. But these profits frequently include matters which would hardly be termed rent as between landlord and tenant ***." (Emphasis supplied.)

Accord, Crane v. Oregon R. & N. Co., 66 Or

317, 328, 133 P 810 (1913). Mesne profits are defined as the rents and profits or the value of the use and occupation of the real property recovered in an action of ejectment for the period during which the property has been wrongfully withheld. Newell, supra, § 2.

There are numerous cases which find that royalty payments pursuant to a lease would constitute mesne profits or rent in an ejectment action. See, United States Steel Corporation v. United States, 270 F Supp 253, 259 (SD NY 1967), aff'd 445 F2d 520 (2d Cir 1971), cert denied 405 US 917 (1972); Moragne v. Doe, ex dem. Moragne et al., 143 Ala 459, 39 So 161, 111 Am St R 52 (1904); Barnard v. Jamison, 78 Cal App2d 136, 177 P2d 341 (1947).

Finally, under ORS 274.530, when the state leases its submersible and submerged lands in navigable streams, the lease is not payable in a lump sum but only on the basis of a price per cubic yard or ton for the material removed. Under the statute, "rent" would be the same as "royalties" and these would be determined on the basis of the total amount of material removed from the river.

In sum, where, as conceded by defendant, the state pleaded lost rent as its damages in an ejectment action, it would be able to show the value of that lost rent through the use of royalties based upon the total amount of material removed from the river.

IV. Amount of Damages

Defendant contends that the court erred in allowing any damages to the state because such damages were speculative and also that the court erred in awarding any damages to the state for the removal of sand and gravel from Parcel 3 as there was no substantial evidence to support the same. The trial court made the following determinations in regard to damages:

> "1. Plaintiff is entitled to recover damages for the period of six years immediately preceeding [sic] the filing of the original complaint herein until date, namely, from June 7, 1959, to date.
>
> "2. Defendant is not entitled to an offset for 'avoidable consequences' or for failure to mitigate damages.
>
> "3. Plaintiff is entitled to damages at 12.5 cents per cubic yard of materials removed, which the Court finds would have been a reasonable sum to be paid as royalty during the entire period of wrongful withholding.
>
> "4. Plaintiff is entitled to damages upon the total amount of minerals taken within the low-high water boundaries as established by this Court.
>
> "5. With respect to materials that were removed, the Court finds as follows:

"(a) 574,000 cubic yards of minerals were removed from Parcel 1.

"(b) 56,000 cubic yards of minerals were removed from Parcel 3. The materials so removed were not subject to the lease between the parties and were in addition to the materials removed by the defendant from Parcel 3, which were subject to the terms of the lease between the defendant and the plaintiff.

"(c) No material was removed from Parcel 4.

"(d) 9,000 cubic yards of minerals were removed from Parcel 5.

"(e) 21,000 cubic yards of minerals were removed from Parcel 6.

"(f) No minerals were removed from Parcel 7.

"(g) The total amount of minerals removed from plaintiff's property was 660,000 cubic yards.

"B. Conclusions of Law

"1. Plaintiff is entitled to recover damages in the amount of $82,500 from the defendant.

"2. The damages are unliquidated

and plaintiff is entitled to interest only from the date of Judgment."

The state's witness testified that the royalties for the material removed ranged from 10 cents per cubic yard to 15 cents per cubic yard in the period of time during which the material was removed. There is thus evidence to support the cubic yard royalty figure established by the court. To establish the amount of damages, the state first introduced evidence dealing with the amount of gravel removed by three independent contractors. Records of the amounts dredged by the Joe Bernert Towing Company were furnished by the defendant to the state's fiscal auditor at the Division of State Lands. These records indicated the number of cubic yards removed during each year of the period 1963-1968 (with the exception of 1966 wherein no material was removed by this independent contractor). Evidence was also introduced dealing with the amount removed by the Willamette Tug and Barge Company based on the number of buckets removed during a given period in 1960 and the average number of cubic yards removed per bucket. Finally, Mr. Alfred Millar testified that he had dredged approximately 40,000 cubic yards from the river. Proof as to location of material taken by the independent dredge operators was based on aerial photographs marked by the witnesses as to locations of removal, and estimates of quantities removed between low watermarks in each parcel and between high water and low watermarks.

Proof was also introduced of the amounts of gravel taken by defendant with its own equipment and personnel. The defendant furnished the state its ledger records which had been prepared on a monthly basis for the period July 1, 1959, to December 31, 1970. Raw production totals of materials were shown from the year 1959 through 1970. The state then estimated that at least 50 percent of the amount of the raw materials production came from the riverbed. Adequate evidence was introduced to support this 50 percent figure.

Combining the figures introduced, the following totals were obtained: Parcel 1: 757,588.3 cubic yards (the trial court found 574,000 cubic yards has been removed); Parcels 2A, 2B and 2C: 104,964.9 cubic yards (the trial court awarded these parcels to the defendant); Parcel 3: 120,468.6 cubic yards (the trial court found that 56,000 cubic yards had been taken out prior to July of 1963); Parcel 5: 11,506.4 cubic yards (the trial court found 9,000 cubic yards had been removed); Parcel 6: 26,427.1 cubic yards (the trial court found that 21,000 cubic yards had been removed).

There is evidence to support the trial court's finding in regard to Parcels 1, 5 and 6.

There is a substantial question raised with regard to Parcel 3. While the evidence introduced by the state showed that

over 120,000 cubic yards had been removed, the state makes no claim for these amounts since they relate to material taken subsequent to July 1, 1963, and thus were covered by the lease between the parties. The state, however, argues that the trial court's award of 56,000 cubic yards should be affirmed on the basis that if the court chose to disbelieve defendant's testimony that it had not dredged in the area of Parcel 3 prior to July 1, 1963, the court was certainly at liberty to do so. There is no evidence in the record to support the assertion that any materials were taken from Parcel 3 prior to July 1, 1963, the effective date of the lease, let alone the 56,000 cubic-yard total found by the trial court. The fact that defendant admitted operating in certain portions of the river does not form an adequate basis for the conclusion that it removed the amount found by the trial court prior to July of 1963. This portion of the judgment must be reversed.

V. Interest on Damages

The trial court awarded the state $82,500 in damages for the reasonable value of the use of plaintiff's premises by defendant for the period June 7, 1959, to May 19, 1972. Interest was awarded only from the date of judgment because the damages were "unliquidated." The state contends that it was entitled as of right to interest

as part of its damages.[7]

The majority of jurisdictions allow interest as part of the damages for the detention of land in ejectment and other actions to gain possession of the land, such interest to run from the date of taking. Annotation, 36 ALR2d 337, 354 (1954). However, the Oregon courts have specifically stated in Meyer v. Harvey Aluminum, 263 Or 487, 501 P2d 795 (1972), that interest is not allowable on unliquidated damages. Damages are unliquidated

> "*** where they are an uncertain quantity, depending on no fixed standard, referred to the wide discretion of a jury, and can never be made certain except by accord or verdict." 25 CJS 615, 626, Damages § 2.

While it is not always easy to categorize damages as "liquidated" or "unliquidated," we hold that in the case at bar the damages fall into the "unliquidated" category. In

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[7]Interest is provided by ORS 82.010:

"(1) The legal rate of interest is six per cent per annum and is payable on:

"*****

"(b) Judgments and decrees for the payment of money from the date of the entry thereof unless some other date is specified therein ***."

Rose City Transit v. City of Portland, ___ Adv Sh ___, ___ Or App ___, ___ P2d ___ (decided August 19, 1974), we allowed interest from the date of the taking of the property in question. However, in Rose City, unlike in the case at bar, the amount and nature of the property taken, the time of taking and the ownership prior to the taking were not at issue. Here, there was active litigation on the amount and location of gravel removed and the ownership of the bed from which the gravel was removed, as well as the value of the gravel removed. In light of all these factors which had to be determined by the finder of fact, it cannot be said that these damages were a sum to be paid in lieu of performance of the contract. See, Medek v. Hekimian, 241 Or 38, 404 P2d 203 (1965). This portion of the trial court's order is affirmed.

VI. Deposition of the State's Expert

On September 20, 1971, defendant filed a motion seeking an order directing that defendant be able to take the deposition of Ronald McReary, the state's expert witness. Defendant further requested that the expert answer all questions put to him relative to the issues of the case and particularly his opinions as to the grounds on which the state claimed ownership of each of the parcels of real property described in the complaint. Further, defendant sought to have the expert produce for examination all physical material, reports, photographs, and

other physical evidence from which he obtained such fa ts forming the basis of his opinion. Argu ent on the motion was heard on September 24, 1971. However, defendant has not designated the transcript of said arguments as part of the record before this court. The trial court denied defendant's motion to depose the expert, but did allow it to have access to relevant supporting da a and information upon which the expert based his opinion.

Depositions of expert witnesses are allowed by ORS 45.151. However, the right to take a deposition may be limited:

> "After notice is served for taking a deposition upon motion seasonably made by any party *** and upon notice and for good cause shown, the court in which the action, suit or proceeding is pending may make an order that the deposition shall not be taken *** or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters ***." ORS 45.181

It is clear that the federal rules of civil procedure relating to discovery and depositions served as a model for the Oregon rules. Richardson-Merrell, Inc. v. Main, 240 Or 533, 402 P2d 746 (1965). Under the federal rules, and thus, by implication the Oregon rules, the granting or denial of a protective order is within the discretion of the trial court. See, 8 Wright and

Miller, Federal Practice & Procedure 267, § 2036 (1970). And, since it is discretionary, only an abuse of that discretion would be cause for reversal. General Dynamics Corp. v. Selb Manufacturing Co., 481 F2d 1204 (8th Cir 1973). In the absence of a transcript of the oral orgument or a showing of a basis of the court's ruling, there is no way this court can say that the trial court abused its discretion and that "good cause" has not been shown.

VII. Splitting of Area into 11 Parcels

In its original complaint, the state described the disputed property as one tract. In its first amended complaint the state split the disputed property into 11 separate parcels and alleged a separate cause of action as to each parcel. The defendant moved to strike the first amended complaint, demurred to it and set up as affirmative defenses both in bar and abatement of the state's alleged arbitrary splitting of a single cause of action.

The "splitting of a cause of action" consists in the commencement of an action for only a part of a cause of action. Wood et ux v. Baker et ux, 217 Or 279, 284, 341 P2d 134 (1950). And, as a general rule, an entire cause of action cannot be divided to be made the subject of two or more actions. 1 Bancroft, Code Practice and Remedies 586, § 384 (1927). One reason for the general prohibition against the splitting of a cause

of action is stated in 1 Bancroft, supra at 586-87:

> "*** If the rule were otherwise, one could split his demand into innumerable parts, thereby multiplying litigation and adding indefinitely to the costs. Moreover, the law does not favor a multiplicity of suits, and requires that all the matters in controversy between parties which may fairly be included in one action be so included."

Accord, Wood et ux v. Baker et ux, supra. Likewise, in Coos Bay Oyster Coop. v. Highway Com., 219 Or 588, 348 P2d 39 (1959), cited by defendant, the court notes that:

> "*** Allowance of separate actions for fractional claims would inevitably result in the pyramiding, duplicating and overlapping of damage items, to the detriment of the condemnor ***." 219 Or at 594.

Defendant contends that the state's splitting of its case into 11 separate claims made the case unduly complicated, and was done solely for the convenience of the state's expert witness. Applying the policy reasons for avoiding the splitting of a cause of action to the facts of this case, it becomes clear that none of the hazards sought to be protected against were present here. First, all of these causes of action were presented in a single

complaint, so there was no danger of the defendant's being harassed by a multiplicity of suits. At the conclusion of the lawsuit, the limits of the property in question, its ownership, and damages, would be determined. As the court noted in Wood et ux v. Baker et ux, supra at 285, where there is no question of a multiplicity of suits there is no violation of the rule against splitting a cause of action. Second, splitting of the one parcel into 11 separate parcels reflects more nearly the various geographical differences and historical origins of the parcels involved. Rather than harassing the defendant, such splitting would make it easier for the factual differences between the parties to be settled.

While Coos Bay Oyster Coop. v. Highway Com., supra, cited by defendant, does support the proposition that interests in land cannot be split into fractional claims, that case involved the attempt to split one interest in real property into several subinterests; this was not the result here. Also, Coos Bay must be evaluated in light of the policy determinants behind the prohibition of a splitting of the cause of action. Viewed in this light, we do not find the splitting of the land in question into 11 separate parcels, each the subject of a cause of action, to be improper.

VIII. Prescriptive Rights

The defendant alleges that the company had, continuously since 1920, conducted sand

and gravel removal operations from the disputed portions of the Willamette River, which removal had been open, continuous, notorious, hostile, exclusive and adverse to the state, and had been known to the state since 1933. The defendant contends that this removal results in the defendant's acquiring an irrevocable property right to remove sand and gravel from the disputed property. The defendant contends that this property right is one of prescription.

There is some authority that a state may lose rights to property through prescription. As noted in 1 Farnham, Waters and Water Rights 225, § 45b:

> "Where the land under tide water may be granted by the state, no reason exists why a private individual cannot establish title under the theory of lost grant. *** [R]ecords may become lost, and it is unreasonable to require the original grant to be produced in all cases. Therefore the presumption of grant may be raised by long possession accompanied by acts of ownership ***."

However, it is important to note that this prescriptive right is limited:

> "*** If the law prohibits the grant of the tide land, no title can be acquired by adverse possession, since no grant can be presumed ***." 1 Farnham, supra at 226.

Between 1878 and 1963, there was no statutory provision by which the state could grant title to any nontidal portion of the Willamette River. See, State v. McVey, supra; Corvallis Sand & Gravel v. Land Board, supra. The authority of the state to grant title to submerged and submersible lands in the Willamette River in the Corvallis area arose after 1963. Since the state has been actively contesting defendant's possession of these parcels since 1958, it is impossible for defendant to contend that there has been a "lost grant" prior to 1963. No prescriptive rights arose against the state.

IX.

Defendant raises several assignments of error which need only brief mention. First, it contends that ejectment will not lie to recover the possession of land under water. This question has, by implication, been decided adversely to defendant's claim in Corvallis Sand & Gravel v. Land Board, supra. See also, Lowndes v. Huntington, 153 US 1, 14 S Ct 758, 38 L Ed 615 (1894); Bates v. Illinois Central Railroad Company, 66 US (1 Black) 204, 17 L Ed 158 (1861).

Defendant's argument that estoppel and acquiescence in the trespass should apply against the state in this case was also decided adversely to defendant's position in Corvallis Sand & Gravel Co. v. Land Board, supra, 250 Or at 328-29. The same policy considerations that militated against the

allowance of the defense of laches in that case apply alike to the defense of estoppel and acquiescence.

Defendant's argument that the statute of limitations applies is without support. ORS 12.250.[8]

Finally, defendant raises certain constitutional challenges to both the ejectment statutes, ORS 105.005, et seq, and the ejectment proceeding as a whole. Both of these points could have been raised in the earlier challenge to the proceeding in Corvallis Sand & Gravel Co. v. Land Board, supra, but were not. Even assuming that these arguments are meritorious, defendant is foreclosed from raising them now.

In sum, we affirm the judgment of the trial court in all respects with the exception of the award of damages for Parcel 3, which award we reverse.

Affirmed in part; reversed in part.

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[8]"Unless otherwise made applicable thereto, the limitations prescribed in this chapter shall not apply to actions brought in the name of the state, or any county, or other public corporation therein, or for its benefit." ORS 12.250.

APPENDIX D

OREGON SUPREME COURT

HOWELL, J.

This is an action in ejectment brought by the state pursuant to ORS 105.005 et seq. The state sought to obtain posession of the Willamette riverbed in the Corvallis area and damages for the reasonable value of the defendant's use of portions of that riverbed. The trial court awarded to the defendant certain portions of the riverbed within an area known as Fischer Cut and awarded other disputed portions to the state. Both parties appealed the judgment of the trial court to the Court of Appeals. The Court of Appeals affirmed the trial court's division of the parcels of land involved but reversed the trial court's award of damages for defendant's use of an area known as Parcel 3.

The history of this litigation and the numerous legal and factual issues are set forth in the opinion of the Court of Appeals, Land Bd. v. Corvallis Sand & Gravel, 99 Adv Sh 1532, ___ Or App ___, 526 P2d 469 (1974). We agree with the Court of Appeals that there was substantial evidence in the record to support either the theory that Fischer Cut of the Willamette was formed by an "avulsive" process or by the "exception to the accretion rule" process as described by the federal court in Commissioners v. United States, 270 F 110, 113-14 (8th Cir

1920). We accepted defendant's petition for review solely on the question concerning the length of the Fischer Cut area through which the Willamette River has coursed since a major flood in 1909.

The trial court made the following findings regarding Fischer Cut:

> "1. Fischer Island from 1853 to 1909 was a peninsula-like formation around which the Willamette River coursed.
>
> "2. By 1890 a clearly discernible overflow channel over the neck of the peninsula had developed known as Fischer Cut.
>
> " *****.
>
> "4. In January of 1906 the Fischer Cut Channel was in practically the same location as it was in 1890. It was estimated then that roughly one-quarter of the flow of the river was carried through Fischer Cut.
>
> " *****.
>
> "6. As a result of a flood of November 25, 1909, the river suddenly and with great force and violence converted Fischer Cut into the main channel of the river.
>
> "7. The change was not gradual and imperceptible, but was a rapid and

> violent change of course, avulsive in character and constituted an avulsion.
>
> " *****."

The trial court awarded Parcels 2A, 2B and 2C to the defendant. These parcels lie between the lines of ordinary high water and encompass a riverbed distance of 1250 feet. In addition to this award, the trial court added to the length of riverbed awarded to the defendant the area downstream from the end of Parcels 2A, 2B and 2C to the confluence of the East River Channel and the Willamette River. This area came from part of Parcel 3 and was made, as the state conceded at oral argument, on the basis of the statutory grants available to riparian owners between 1874 and 1878.

On appeal to this court, the state maintains that the trial court's findings regarding the length of Fischer Cut are correct. However, Corvallis Sand & Gravel contends that Fischer Cut is 3200 feet in length and that the trial court's finding of the length of the Cut is not supported by the evidence.

The evidence concerning the length of Fischer Cut consists of various documents and testimony. The asserted 1250-foot length of Fischer Cut coincides with the linear riverbed distance of Parcels 2A, 2B and 2C which the state first claimed in its 1969 complaint. The state argues that

portions of the Fischer Cut area eroded away between 1890 and the 1909 flood. At trial, the state's expert witness, Ronald McReary, utilized a 1936 aerial photograph to point out an alleged cutbank on the upstream side of Parcels 2A, and 2B, thus suggesting that the Cut was only 1250 feet long. The state also relied upon the testimony of one of its witnesses, Fred Fischer, who, as a boy, roamed through the area of Fischer Cut and who testified that the Willamette River moved east and took several acres of land with it. However, the state, in attempting to prove its erosion theory and the 1250-foot figure, relies on documentary evidence showing the area after the 1909 flood. Further, Mr. Fischer's testimony, taken as a whole, fails to explain whether the erosion he referred to occurred before or after 1909.

The evidence that Fischer Cut at the time of the 1909 flood was 3200 feet in length is substantial and highly persuasive. The trial court found that in 1906 the Fischer Cut was in practically the same location as it was in 1890 and that until 1909 the Willamette River continued to flow around Fischer Island. In 1890 the U. S. Army Corps of Engineers carefully mapped this stretch of the Willamette River, including the area of Fischer Cut. The 1890 Clapp map shows the existence of an overflow channel in the Fischer Island area. Both parties stated that this map was carefully drawn and prepared. The scale shows that the overflow channel from "upstream"

to "downstream" points is approximately 3200 feet in length.

Later, in 1906, three years before the flood, Major G. W. Roessler of the Corps of Engineers sent Assistant Engineer David B. Ogden to examine the overflow channel in the area of what today is known as Fischer Island. Ogden's report to Roessler states, in pertinent part:

> "The channel in question is across the neck of a peninsula and is some 3200 feet long, while the distance around by the main river is two and one-quarter miles.
>
> "This channel has existed for a number of years as maps on file in this office show it in practically the same location in 1890, though the mouth of the channel was then closed by a gravel bar. The fall from its head to its food [sic] is noted as about 8 feet. The approximate location is shown in dotted lines on the sketch herewith."[1]

In addition, the state's witness stated

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[1]The distance on the sketch accompanying the engineer's report scales at slightly less than the 3200 feet stated in the body of the letter. However, the 1906 sketch did not purport to represent the exact length of the cutoff or overflow channel, only its approximate location.

on cross-examination:

> "*** I would say the best evidence of it [the length of the eroded chute] is the distance shown on the map of 1890 which appears to be a very carefully prepared and well-engineered drawing and I would say that that is the length of the gully that eventually eroded into what is now the bed of the river."

We find that the best evidence of the length of Fischer Cut at the time of the 1909 flood is the 1890 map, which both parties agreed was carefully prepared and which shows Fischer Cut to be approximately 3200 feet in length.

It is difficult, based on the present record, to correlate the length of Fischer Cut in 1909 to the topography as it existed at the time of trial. We do find, however, that the length of Fischer Cut as it existed in 1909 at the time of the flood is best represented by the channel from point A to point B as shown on the 1890 map. We remand this action to the Court of Appeals with directions to remand to the trial court to correlate points A and B with the present topography of the area. Additional testimony may be taken if necessary. Also, on the remand, the trial court should modify or adjust any damages in accordance with our decision herein expanding the length of Fischer Cut. In all other respects the decision of the Court of Appeals is affirmed.

Affirmed as modified.

APPENDIX E

ORDER DENYING PETITION FOR REHEARING

HOWELL, J.

In our original opinion we emphasized that we accepted the defendant' petition for review of the decision of the Court of Appeals on the sole issue of the length of Fischer Cut as it existed at the time of the 1909 flood. We held that the length of Fischer Cut as it existed in 1909 was best represented by the channel from Point A to Point B as shown on the 1890 map and remanded the cause with directions to the trial court to correlate Points A and B with the present topography of the area and to modify or adjust any damages accordingly.

Both parties have filed petitions for rehearing. The defendant's petition raises no new matter and is denied. The petition of the plaintiff, the State of Oregon, expresses concern that our opinion could be interpreted to include as an award to defendant a portion of the riverbed in Parcel 3 which the plaintiff leased to the defendant in 1963 and which defendant has admitted in its pleadings that it had no ownership therein.[1]

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[1]The plaintiff leased to defendant "That portion of the bed of the Willamette River owned and controlled by the State of Oregon

To prevent any misunderstanding, our former opinion is clarified to the following extent: if correlating Points A and B of Fischer Cut results in any portion of that length falling within a portion of the riverbed to which the defendant has disclaimed ownership, then the ownership of plaintiff remains unaffected.

Both petitions for rehearing are denied.

beginning at its confluence with East River (East Channel of the Willamette River) and extending downstream 4000 feet all in section 2 Township 12 South Range 5 West Willamette Meridian."

The defendant's amended answer alleged: "Defendant is the owner in fee simple of the property described in defendant's amended complaint, except that defendant does not own that portion leased by plaintiff to defendant ***." (Emphasis supplied)